No. 82-2043

IN THE

# Supreme Court of the United States

OCTOBER TERM 1983

CHARLES T. WALSH,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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## TABLE OF AUTHORITIES

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## REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

1. Respondent apparently misapprehends petitioner's contention that his conspiracy conviction under Count 7 of the indictment was barred by the statute of limitations. Petitioner does not, as respondent asserts at page 6 of its Brief in Opposition, argue that the statute of limitations is a "jurisdictional" bar to prosecution. To the contrary, while directing the Court's attention to the conflict among the Circuits as to whether statutes of limitations in federal criminal cases are to be regarded as jurisdictional or as affirmative defenses,[1] peti-

1 Respondent concedes the conflict. *See* Brief in Opposition at 6-7 & n.5. Respondent, however, attempts to minimize it by suggesting that it is "unclear whether [the cases from the Sixth and Tenth Circuits] would be decided in the same manner today," apparently arguing that this Court should simply wait and see. Contrary to respondent's view, it does not conserve judicial resources to leave lower courts in confusion on an issue that is openly acknowledged to divide the Circuits and that must be decided here at some point.

tioner is explicit in stating that "[t]his Court need not go so far as to deem [the statute of limitations] a jurisdictional requisite that can never be waived." (Pet. 8.) The question for the Court, rather, is whether, even assuming the statute is waivable, such a waiver occurred here by reason of petitioner's inadvertence in omitting to object at trial to the absence of a jury instruction on an essential part of what the Government was required to prove. Petitioner contends that a valid waiver must be knowing and voluntary, not merely the result of counsel's procedural misstep.

Petitioner's argument is simple. As this Court has stated, it is "incumbent on the Government to prove that the conspiracy . . . was still in existence on [the date the statute ran], and that at least one overt act in furtherance of the conspiracy was performed after that date." *Grunewald* v. *United States,* 353 U.S. 391, 396 (1957). Since the statute of limitations issue is therefore an essential ingredient of what the prosecution must prove, the trial court's failure to instruct the jury on it is among the "plain errors or defects affecting substantial rights" under Rule 52(b) of the Federal Rules of Criminal Procedure, noticeable for the first time on appeal. *See Screws* v. *United States,* 325 U.S. 91, 107 (1945) (plurality opinion by Douglas, J.). Although a defendant may waive putting the prosecution to its proof, such a waiver must be executed knowingly and voluntarily. Significantly, the courts that have permitted waivers of the statute of limitations (including the cases cited by respondent at pages 6-7 of its Brief of Opposition) have done so almost exclusively in the context of explicit, knowing, and voluntary pretrial waivers, rather than by imputing waiver through procedural default. *See, e.g., United States* v. *Williams,* 684 F.2d 296, 299-300 (4th Cir. 1982), *cert. denied,* 103 S. Ct. 739 (1983); *United States* v. *Levine,* 658 F.2d 113, 121 (3d Cir. 1981); *United States* v. *Akmakjian,* 647 F.2d 12, 14 (9th Cir.), *cert. denied,* 454 U.S. 964 (1981); *United States* v. *Wild,* 551 F.2d 418, 424-25 (D.C. Cir.), *cert. denied,* 431 U.S. 916 (1977).[2]

2 Respondent attempts to avoid the entire issue by suggesting, in a footnote, that the acquittal on the conspiracy count of co-defendant Barbato—who was charged with committing the only two overt acts

2. Petitioner argues that the imposition in this case of cumulative punishments for a substantive RICO violation and for the predicate acts supporting it violated the Double Jeopardy Clause. Respondent's answer, however, completely ignores petitioner's statutory and legislative history arguments. Instead, respondent is apparently content to rest on the naked assertion, devoid of analysis, that surely such authorization must exist, somewhere, in the RICO statute. This is the same error made by the Court of Appeals below, and by the cases on which it relied and which respondent also cites (Brief in Opposition at 10)—to assume, even in the absence of any supporting legislative statements, that Congress authorized cumulative penalties for RICO and its predicates. This Court should not permit this perpetuation of a basic error in the interpretation of a major federal criminal statute.

Respondent does not contest the fact that RICO and its predicates constitute the "same" offense for double jeopardy purposes; and there is no question that cumulative punishments for the same offenses are unconstitutional unless Congress expressly and clearly indicates its contrary intent. *Missouri* v. *Hunter,* 103 S. Ct. 673, 679 (1983); *Whalen* v. *United States,* 445 U.S. 684, 691-92 (1980). Such authorization is patently lacking in the RICO statute and its legislative history. As petitioner has already pointed out (Pet. 14-16), none of the statutory or legislative passages cited by respond-

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that allegedly fell within the five-year limitations period—does not necessarily mean that the jury concluded that the Government had failed to prove the occurrence of the necessary overt acts. *See* Brief in Opposition at 8-9 n.6. For this proposition, respondent cites *United States* v. *Montgomery,* 440 F.2d 694, 696 (9th Cir.), *cert. denied,* 404 U.S. 884 (1971), which states that the actions of an innocent "dupe," performed at the direction of a co-conspirator, are attributable to the conspiracy. This principle has no application to the present case, where the acts charged to Barbato were allegedly taken as part of a continuing conspiracy between petitioner and Barbato to prevent disclosure of prior illegal activities. It is inconceivable that the jury could have concluded that Barbato committed these acts but was not a co-conspirator.

ent comes close to constituting the requisite clear expression of congressional intent; none, in fact, has anything to do with the question of cumulative penalties. Far from granting specific authority for cumulative penalties, at no time did Congress so much as mention the issue. Congress' silence on this point is eloquent; and as this Court has stated, it must be assumed from such silence that Congress legislated with the double jeopardy prohibition in mind. *Albernaz* v. *United States,* 450 U.S. 333, 341-42 (1981).[3]

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3 Respondent contends that petitioner would have been convicted of the substantive RICO offense even if the predicate offenses for which he was punished cumulatively—Counts 3 through 6—had not been alleged. (Brief in Opposition at 10 n.10). This contention is irrelevant. It is petitioner's separate conviction and cumulative punishments under Counts 3 through 6 that form the basis for his double jeopardy challenge, not the RICO conviction.

Similarly beside the point is respondent's assertion that the view of petitioner's conduct expressed by the Court of Appeals provides a reason to suppose that the District Court would be disinclined to reconsider petitioner's total sentence even if his sentences on Counts 3 through 7 were vacated. (Brief in Opposition at 5 n.3). The Court of Appeals does not impose sentence. That is a matter for the District Court to consider on remand.

## Conclusion

For the foregoing reasons, as well as for those stated in the petition for certiorari, the petition for certiorari should be granted.

Respectfully submitted,

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